No. 06-5618

In the Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE SENATORS EDWARD M. KENNEDY, ORRIN G. HATCH, AND DIANNE FEINSTEIN IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

Amici are United States Senators with extensive involvement and interest in federal sentencing. Senator Edward M. Kennedy is a Democrat from Massachusetts. He is a former Chairman of the Senate Judiciary Committee, has served on the Committee since 1963, and introduced the bill that became the Sentencing Reform Act of 1984 ("Sentencing Reform Act"). Senator Orrin G. Hatch is a Republican from Utah. He is a former Chairman of the Senate Judiciary Committee, has served on the Committee since 1977, and was an original co-sponsor of the bill that became the Sentencing Reform Act. Senator Dianne Feinstein is a Democrat from California. She is the first woman member of the Judiciary Committee and has served on the Committee since 1994. The Senate Judiciary Committee has legislative jurisdiction over the federal criminal justice system. Members of the Committee have been involved in monitoring the operation of the federal sentencing system and amending the federal sentencing law when appropriate.

The Sentencing Reform Act was the product of more than a decade of inter-branch, bicameral, and bipartisan deliberations – the most careful examination of sentencing policy ever conducted by Congress. In enacting this legislation, Congress sought to remedy the "shameful disparity in criminal sentences" that plagued the federal sentencing system and created "a disrespect for the law." S. Rep. No. 98-225, at 46, 65 (1983). Amici have a strong interest in advancing the fundamental goals of the Act, including the elimination of unwarranted disparities, the promotion of transparency in sentencing, and the preservation of judicial

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the amici and their counsel, made a monetary contribution for the preparation or submission of this brief. Petitioner has filed a general consent for amicus briefs in this case, and a letter of consent from respondent has been submitted concurrently with this filing.

discretion sufficient to allow the fair and thoughtful imposition of individual sentences.

SUMMARY OF ARGUMENT

This Court should continue the effort it began in *United States v. Booker*, 543 U.S. 220, 244 (2005), to harmonize its Sixth Amendment jurisprudence with the structure and goals of the Sentencing Reform Act.

Congress enacted and President Reagan signed this legislation to address a national disgrace: the wide disparity in sentences imposed in federal criminal cases. The unguided, unreviewable discretion given to federal judges had resulted in gross disparities throughout the nation. Judges handed out vastly differing sentences of offenders who had similar backgrounds and had been convicted of similar crimes. Some escaped prison altogether, while others were imprisoned for excessive periods. Illegitimate factors such as race, gender, and poverty distorted sentencing decisions. The impact on our criminal justice system was devastating. There was no certainty in punishment. Many offenders viewed sentencing as a game of chance in which they could play the odds on avoiding punishment. The system bred public cynicism and disrespect for the law, in flagrant violation of the principle that our government is a "government of Laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

In *Booker*, the Court effectively nullified the provision of the Sentencing Reform Act, 18 U.S.C. § 3553(b)(1), that had established the generally mandatory nature of the federal sentencing guidelines. Under this provision, district courts had been bound to impose sentences within the applicable guideline range, except when an aggravating or mitigating factor not adequately considered by the Sentencing Commission warranted a departure. By nullifying this provision, the Court effectively made the guidelines advisory. It chose this approach in order to achieve a functioning sentencing system

that both satisfies constitutional standards and, to the greatest extent possible, advances the intent of Congress to eliminate unwarranted disparity, achieve transparency in sentencing, and impose individualized sentences tailored to the offender and the crime.

Amici agree that that these goals should continue to guide the Court's sentencing jurisprudence. We recognize the possibility that the *Booker* remedy may, over time, result in more disparities, but that fear has not yet been realized. We also agree that the surviving provisions of the Act – if respected faithfully by the courts, the Sentencing Commission, and Congress -- can still provide the framework for a cohesive and effective sentencing system. In this brief, we point to key elements of the Act that will, in the post-*Booker* era, allow the development of rules that promote fair and uniform sentences.

The main sentencing directive left in place after *Booker* establishes uniform general criteria for courts to consider in formulating a sentence. These criteria refer the court to, among other things, the nature of the offense and the characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, provide just punishment, act as a deterrent, and provide appropriate rehabilitative and treatment options; the availability of alternative sanctions; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims. Congress established these criteria to ensure that all federal courts would consider the same general factors and purposes of punishment.

Section 3553(a) also directs courts to consider the applicable range under the sentencing guidelines and any pertinent policy statement issued by the Commission. Amici urge the Court to direct district courts to calculate the applicable guideline range at the outset of the sentencing process. The guidelines will then provide a benchmark for consideration of the other factors in § 3553(a), which we

believe the courts should evaluate with an appropriate degree of deference to the views expressed by the Commission. Congress intended the Commission to establish sentencing policies based on objective data and sound public policy, not prejudice or politics, and courts should respect that institutional role.

Amici recognize that after *Booker*, there is no general mandate that courts impose sentences within the guidelines. Given this change, two elements of the statutory scheme are even more critical than before to achieving uniformity. First, 18 U.S.C. § 3553(c) requires a district court to state "the reasons for its imposition of a particular sentence," regardless of whether it is within the guidelines. Second, by excising 18 U.S.C. § 3742(e), a provision on standards of appellate review that relied "upon the Guidelines' mandatory nature," *Booker*, 543 U.S. at 245, the Court effectively expanded appellate review for "reasonableness" to all sentences. Amici urge the Court to apply these provisions with the purpose of establishing a national law on sentencing: a body of principled rules, developed through the reasoned judgment of judges across the nation subject to appellate review, that promote fairness, transparency, and consistency.

In the case below, the district court may have been justified in imposing a sentence below the applicable guideline range based on the circumstances of the offense, the defendant's background, and other factors – including the disproportionate emphasis assigned by the sentencing guidelines to the relevant quantity of crack cocaine. In our view, however, the court failed to state a sufficiently clear and principled basis for its sentence that can be readily applied by other courts in like circumstances and reviewed for reasonableness on appeal. The Eighth Circuit Court of Appeals was therefore correct to remand the case for resentencing, and we urge this Court to affirm that decision.

ARGUMENT

I. PRIOR TO THE SENTENCING REFORM ACT, FEDERAL SENTENCING WAS ARBITRARY, INCONSISTENT, AND UNFAIR.

For most of the nation's history, the sentencing discretion of federal judges was virtually "unfettered." *Dorszynski v. United States*, 418 U.S. 424, 437 (1974). Congress had prescribed for most federal offenses a broad range of punishment that could be imposed on a convicted defendant. A judge was free to impose a sentence anywhere within that range, based on virtually any information he deemed relevant, after conducting "an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972) (citations omitted). Sentences imposed by district judges, "if within statutory limits," were "generally not subject to review." *Id.* at 447 (citations omitted). *See generally* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 225-27 (1993).

Before the mid-20th century, the effect of such indeterminate sentencing had become clear. In 1938, Attorney General Cummings reported "that there frequently occur wide disparities and great inequities in sentences imposed in different districts, and even by different judges in the same district, for identical offenses involving similar states of fact," making it "difficult to maintain that equal, even-handed justice is attained." U.S. Dep't of Justice, *Annual Report of the Attorney General*, 6, 7 (1938). This view was reiterated in reports by Attorneys General Murphy, Jackson, and Biddle, and thereafter by Congress. *See id.*, at 6 (1939); *id.* at 5-7 (1940); *id.* at 4 (1941); *see also* H.R. Rep. No. 85-1946, at 6 (1958) (Congressional report on "existence of widespread disparities in the sentences imposed by Federal

courts . . . in different parts of the country, between adjoining districts, and even in the same districts").

In an influential 1972 treatise, Marvin Frankel, a district judge and former law professor, described the disparities as "terrifying and intolerable for a society that professes devotion to the rule of law." Marvin E. Frankel, *Criminal Sentences: Law Without Order* 5, 66 (1972). Judge Frankel considered such disparities a threat not only to the integrity of the legal system, but also to the dignity and welfare of defendants subject to "potentially arbitrary or malicious exercises of power." *See* Michael O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. Cin. L. Rev. 749, 760 (2006).

During the 1970s, a number of empirical studies documented significant disparities in federal sentencing. A 1972 study by the United States Attorney's Office for the Southern District of New York determined that "[t]he range in average sentences for forgery runs from 30 months in the Third Circuit to 82 months in the District of Columbia [Circuit]. For interstate transportation of stolen motor vehicles, the extremes in average sentences are 22 months in the First Circuit and 42 months in the Tenth Circuit." S. Rep. No. 98-225, at 41 n.143 (1983) (quoting Whitney N. Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163, 167 (1973)). A 1974 study by the Second Circuit underscored the problem. Fifty district judges were given identical files from 20 actual criminal cases and asked to impose a sentence. "The variations in the judges' proposed sentences in each case were astounding." Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law With Order*, 16 Am. Crim. L. Rev. 353, 358 (1979) (citing Anthony Partridge & William B. Eldridge, *The Second Circuit Sentencing Study, A Report to the Judges of the Second Circuit* 6-7 (1974)). *See generally* Norval Morris, *Towards Principled Sentencing*, 37 Md. L. Rev. 267,

272-74 (1977) (stating that "the data on unjust sentencing disparity have indeed become quite overwhelming").

Even more disturbing, studies indicated that at least some sentencing disparities resulted from consideration of race, gender, and other illegitimate factors. *See Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong. pt. 13, at 9047 (1977) ("The statistics are appalling. . . . [W]hen both the crime and the previous history of the offender are held equal, black and minority offenders fare considerably worse.") (testimony of Prof. Alan M. Dershowitz); H.R. Rep. No. 98-1017, at 102 (1983) (noting the "potential for sentencing decisions to be based on inappropriate grounds such as race or sex"). *See also* Edward M. Kennedy, *Introduction to Symposium on Sentencing, Part I*, 7 Hofstra L. Rev. 1, 2 (1978) ("The present process results in particularly disparate treatment of the young and the poor and nurtures a growing public cynicism about our institutions.").

By the mid-1970s, a consensus had developed among judges, lawyers, and criminal justice experts about the need to address the "shameful disparity in criminal sentences" that plagued the existing system. S. Rep. No. 98-225, at 65 (1983). During nearly ten years of hearings, Congress heard from scores of witnesses with a broad range of philosophies and expertise. They described a system in which similarly situated defendants received vastly different sentences because they appeared before different federal judges. Judges were not required to explain their sentences, and appellate courts had no authority to remedy the disparate sentencing practices of district judges in their circuits. Because of the inconsistent and unpredictable application of parole, a defendant might receive a lengthy prison sentence but serve only a portion of it. *See* Stith & Koh, *supra*, at 227-28 (describing criticism of indeterminacy and arbitrari-

ness of federal parole system). As a result, Senator Kennedy concluded, the federal criminal justice system was "in desperate need of reform. . . . It is unfair to the defendant, the victim, and society. It defeats the reasonable expectation of the public that a reasonable penalty will be imposed at the time of the defendant's conviction, and that a reasonable sentence actually will be served." S. Rep. No. 98-223, at 34 (1983) (quoting 129 Cong. Rec. S2090 (daily ed. Mar. 3, 1983)).

II. CONGRESS HAS SOUGHT TO PROMOTE CONSISTENCY WHILE MAINTAINING THE DISCRETION OF JUDGES TO IMPOSE FAIR AND PROPORTIONAL SENTENCES.

A. The Sentencing Reform Act Was Based on Extensive Bipartisan Deliberation.

The Sentencing Reform Act was the result of more than a decade of reports, hearings, and deliberations on federal sentencing involving all branches of government, academic researchers, practitioners, and other interested parties. It represents Congress' most comprehensive effort to reform the federal sentencing system.

Senator Kennedy first introduced a bill proposing the creation of sentencing guidelines in 1975. *See* S. 2699, 94th Cong. (1st Sess. 1975). The proposal was refined by Senators Kennedy and McClellan and, in the following Congress, it was included in a more comprehensive bill to revise the federal criminal code. *See* S. 1437, 95th Cong. (1st Sess. 1977). As introduced and passed by the Senate Judiciary Committee on November 15, 1977, S. 1437 contained most of the critical provisions of the statutory scheme that would be enacted seven years later. It abolished parole, thus ensuring that offenders' would generally serve the full sentence imposed. It created a sentencing commission, directed it to promulgate sentencing guidelines, and estab-

lished a right of appellate review for sentences above or below applicable guideline ranges.

The bill passed by the Committee also gave federal judges substantial discretion to depart from the guidelines. It directed judges to consider a wide range of factors, including the guideline range, the general purposes of sentencing, and "the nature and circumstances of the offense and the history and characteristics of the defendant." *See* S. 1437, § 101, 95th Cong. (1st Sess. 1977) (proposed tit. 18, § 2003(a), as reported by Senate Judiciary Committee on Nov. 15, 1977). In the event judges decided to depart from the guideline range, the bill required them to state a "specific reason." *Id.* at § 101 (proposed tit. 18, § 2003(c)). Under this directive, judges were required to "pay deference to the guidelines," but deference was "not a duty; the court would not be bound by the guidelines." *See* Kennedy, *Toward a New System*, *supra*, at 374. The requirement of a judicial statement and the availability of appellate review served as checks "against unreasonable punishment." *Id.* at 370. As modified and enacted, these provisions became 18 U.S.C. § 3553(a) and (c).

After S. 1437 was reported to the Senate, the Senate adopted an amendment sponsored by Senator Hart that directed judges "to impose a sentence within the range specified in the Commission's guidelines unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a different sentence." *See* 124 Cong. Rec. 382-83 (1978) (Unprinted Amendment No. 1100 adopted Jan. 23, 1978). Senator Kennedy recommended the amendment's adoption in order to "make clearer the basic presumptive aspects of the guidelines." 124 Cong. Rec. 383 (1978). As modified and enacted, this provision became 18 U.S.C. § 3553(b).

S.1437 was passed by the Senate on January 30, 1978. It was carried forward and further refined in the next two Congresses, *see* S. 1722, 96th Cong. § 125 (1st Sess. 1979); S. 1630, 97th Cong. § 125 (1st Sess. 1981), and was reported to the Senate with the support of nearly all members of the Judiciary Committee. In 1982, the proposals were endorsed by the Attorney General's Task Force on Violent Crime and were included in S. 2572, 97th Cong. (2d Sess. 1982), which passed the Senate on September 30, 1982, by a vote of 95 to 1. Similar legislation was approved by the House Judiciary Committee during this period. *See* H.R. 6915 and H.R. Rep. No. 96-1396 (2d Sess. 1980).

On March 3, 1983, Senators Kennedy, Thurmond, Biden, Hatch, Leahy, Specter, and others introduced S. 668, the "Sentencing Reform Act of 1983." Five days of hearings were held on the legislation before the Subcommittee on Criminal Law of the Senate Judiciary Committee. The Committee reported two bills containing identical guidelines provisions to the Senate. *See* S.688, *reported by* S. Rep. No. 98-223 (1983); S. 1762, tit. II (sentencing reform), *reported by* S. Rep. No. 98-225 (1983). After extended debate, the Senate passed both bills by overwhelming majorities: 91 to 1, 130 Cong. Rec. S759 (daily ed. Feb. 2, 1984); and 85 to 3, *id.* at S818-819. After the House of Representatives passed similar sentencing provisions, 130 Cong. Rec. H10130-31 (daily ed. Sept. 25, 1984), the Sentencing Reform Act was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified as amended in scattered sections of 18 U.S.C.). President Reagan signed the bill into law on October 12, 1984.

B. The Sentencing Guidelines Were Intended to Channel, Not Eliminate, the Discretion of Judges.

In enacting the Sentencing Reform Act, Congress did not seek to eliminate judicial discretion. Instead, it sought to achieve increased transparency, consistency, and proportion-

ality in sentencing while preserving the discretion of courts to impose appropriate sentences based on the specific characteristics of offenders and crimes.

To increase uniformity and proportionality in sentencing, Congress established the Sentencing Commission and directed it to promulgate sentencing guidelines. The Commission began its work in 1985 and transmitted its initial guidelines to Congress in April 1987, and they became effective six months later.

From the time the Sentencing Reform Act was enacted, tension between the directives to judges set forth in § 3553(a) and (b) generated "confusion and heated debate" about the mandatory or advisory nature of the guidelines. Stith & Koh, *supra*, at 246. As discussed above, § 3553(a) represents the original directive set forth in the bill passed by the Senate Judiciary Committee on November 15, 1977. S. 1437, 95th Cong. (1st Sess. 1977). Under what has come to be known as the "parsimony" clause, § 3553(a) requires judges to "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing set forth in § 3553(a)(2). Section 3553(a) also lists seven factors for judges to consider in imposing a sentence: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the purposes of sentencing; (3) the range of available sentencing alternatives; (4) the applicable Guidelines sentence; (5) any pertinent policy statements issued by the Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. By contrast, § 3553(b), added to the bill on the Senate floor, directed judges to follow the guidelines unless they found "that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described [by the guidelines]."

Following enactment, some authorities argued that the more open-ended directive in § 3553(a) should take precedence over § 3553(b). *See, e.g., United States v. Denardi*, 892 F.2d 269, 275-77 (3d Cir. 1989) (Becker, J., concurring in part and dissenting in part); Marc Miller & Daniel J. Freed, *Editors' Observations: Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 Fed. Sent'g Rep. 235-38 (1991). The Sentencing Commission, on the other hand, maintained that § 3553(b) trumped § 3553(a) and required judges to impose sentences within the applicable guideline range except in the unusual case where the Commission had not already considered a potential basis for departure in the guidelines. Thus, it asserted, "in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure." *See U.S. Sentencing Guidelines Manual* ch. 1, pt. A, § 4(b) (1987).[2]

The courts ultimately agreed that the directive in subsection (b), not (a), controlled the sentencing determination. As this Court summarized in *Mistretta v. United States*, 488 U.S. 361 (1989), the Act made the guidelines "binding on the courts," while preserving "for the judge the discretion to

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[2] In 1987 the tension between § 3553(a) and (b) surfaced in a congressional dispute involving a seemingly technical amendment to the Act: a provision adding the phrase "of a kind, or to a degree" as a qualifier to the term "an aggravating or mitigating circumstance" in § 3553(b). Sentencing Reform Act of 1987, § 3, Pub. L. No. 100-182, 101 Stat. 1266. A statement prepared in the House of Representatives observed that the Commission's purported consideration of a factor did not preclude its use as a ground for departure from the applicable guideline range – and, moreover, that § 3553(a) provided an independent avenue for departure. *See* 133 Cong. Rec. 31,947-49 (1987). In response, four leading Senate sponsors of the Act submitted a joint statement asserting that the amendment did not change the standard for departure, which was governed "exclusively" by § 3553(b). 133 Cong. Rec. S16,646 (daily ed. Nov. 20, 1987) (joint statement of Senators Biden, Thurmond, Kennedy, and Hatch).

depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines." *Id.* at 367.

In this context, it is important to distinguish the sentencing guidelines from mandatory minimum sentences, which require a "one size fits all" sentence for defendants convicted of a certain crime, regardless of the specific nature of the offense or the defendant's background. Judges, experts, and practitioners in the federal criminal justice system have long opposed mandatory minimums on the ground that they undermine the goals of the Sentencing Reform Act by fostering unwarranted disparity, subjecting defendants with differing levels of culpability to the same punishment, and adding another unnecessary layer of complexity to the sentencing process. *See, e.g., ABA Justice Kennedy Commission Report with Recommendation to the ABA House of Delegates*, Res. 121A at 27-29 (A.B.A. 2004); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185, 192-96 (1993).[3]

By contrast, it is instructive to consider the extent to which Congress believed that even its "mandatory" directive, codified in 18 U.S.C. § 3553(b), preserved the discretion of judges to impose punishment that fit both individual offenders and crimes. *See Williams v. New York*, 337 U.S. 241,

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[3] Some advocates of mandatory sentencing laws believe that coerced uniformity is appropriate. These laws do not produce uniformity, however; they merely transfer discretion from judges to prosecutors, who decide whether defendants will be charged with an offense carrying a mandatory penalty and whether to insist on a plea to that count of the indictment. A guideline system, whether mandatory or advisory, makes judges accountable for the discretion they exercise; mandatory minimums impose no similar check on prosecutors.

247 (1949). In the Senate Report, the sponsors of the Act stated that they did not intend for the guidelines to be "imposed in mechanistic fashion." S. Rep. No. 98-225, at 52 (1983). To the contrary, they believed that judges were obligated "to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case." *Id.*

> The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences. Indeed, the use of sentencing guidelines will actually enhance the individualization of sentences as compared to current law.

Id. at 52-53. Citing the experience of the U.S. Parole Commission, which used guidelines to determine presumptive release dates for federal prisoners, the sponsors expressed their expectation that departure from the sentencing guidelines would be proper in as many as 20% of cases. *Id.* at 52 n.193.

III. THE COURT SHOULD CONTINUE TO ADVANCE THE GOALS OF THE SENTENCING REFORM ACT.

A. The Remedial Opinion in *Booker* Properly Sought to Retain a System Consistent with Congress' Intent "as Embodied in the 1984 Sentencing Act."

Like all Acts of Congress, the Sentencing Reform Act is entitled to a strong presumption of constitutionality. The extensive inter-branch deliberations and strong bipartisan consensus that led to its passage weigh heavily against any judicial modification of the statutory scheme that is inconsistent with Congress' goals.

Clearly, Congress did not anticipate how the Court would ultimately apply the right to jury trial in the context of non-capital sentencing. As this Court noted in *Mistretta*, the sentencing guidelines "do no more than fetter the discretion of sentencing judges to do what they have done for generations – impose sentences within the broad limits established by Congress." 488 U.S. at 396. In enacting the law, Congress did not intend that juries would assume the responsibility for making the complex factual determinations traditionally left to sentencing judges.

In *United States v. Booker*, 543 U.S. 220, 244 (2005), this Court held that the Sixth Amendment is violated by the imposition of an enhanced sentence under the guidelines based on a judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. The Court based its holding on its prior decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). Collectively, these cases have been described as "a new Sixth Amendment jurisprudence with profound implications for sentencing procedures." Douglas A. Berman, *Conceptualizing Booker*, 38 Ariz. St. L.J. 387, 401 (2006). *See also Booker*, 543 U.S. at 247-48 (describing the holding as "legislatively unforeseen" and "a constitutional requirement that creates fundamental change"); *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting) ("a watershed change in constitutional law").

Amici do not challenge the validity of the Court's holding. The Court has clearly sought to give full respect to the Sixth Amendment right to jury trial – a critical protection against injustice throughout our history and a fundamental part of our democracy. Instead, amici urge the Court to apply this constitutional right in a manner consistent with the basic structure and goals of the Sentencing Reform Act. In this respect, amici commend the Court for its effort in

Booker to devise a remedy that conforms most closely to Congress' intent. *See* 543 U.S. at 246.

The merits majority in *Booker* made clear that the Sixth Amendment problem arose from the "mandatory" nature of the sentencing guidelines. It explained that if the guidelines "could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Booker*, 543 U.S. at 233. While noting the tension between § 3553(a) (which "lists the Sentencing Guidelines as one factor to be considered in imposing a sentence") and § 3553(b), the Court reiterated its view that the latter directive took precedence and made the guidelines "not advisory; [but] mandatory and binding on all judges." *Id.* at 233-34 & n.2 (citing *Mistretta*, 488 U.S. at 367). As such, their application violated the Sixth Amendment.

Rather than strike down the Act in its entirety or impose a "jury trial" requirement not anticipated by Congress, the remedial majority sought to make changes that deviated least "from Congress' intended system." *Id.* at 247. Specifically, it decided to retain all provisions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) "consistent with Congress' basic objectives in enacting the statute." *Id.* at 258-59. It excised two provisions it found inconsistent with the Sixth Amendment holding: § 3553(b)(1) (as amended), the provision directing judges to sentence defendants within the applicable guideline range absent a special justification for departure; and 18 U.S.C. § 3742(e), a provision enacted in 2003 that established new appellate review standards for departures and which, in the Court's view, depended "upon the Guidelines' mandatory nature." *Id.* at 245.

The result of the majority's holding is a system of advisory guidelines much like that initially approved by the

Senate Judiciary Committee in 1977. *See id.* (stating that excisions make "the Guidelines effectively advisory"). While not strictly bound by the guidelines, judges must still consult them and take them into account, along with the other factors enumerated in § 3553(a). *Id.* at 245-46, 259, 264. With the Court's excision of § 3742(e), the same factors guide appellate courts in reviewing sentences for "reasonableness." *See id.* at 261-64.

This system, the Court conceded, was not the system of mandatory guidelines enacted by Congress. *Id.* at 265. The Court predicted, however, that the continued operation of the Sentencing Commission, consideration of the guidelines by district judges, and appellate review would "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264-65; *see also id.* at 246 (stating that this approach makes "the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct – a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve").

B. Key Elements of the Extant Statutory Scheme Promote Transparency, Consistency, and Fairness in Sentencing.

At the conclusion of its opinion in *Booker*, the majority noted that the "ball now lies in Congress' court," suggesting that Congress may wish to devise a new system that advances its policy objectives in a manner compatible with the Court's Sixth Amendment doctrine. 543 U.S. at 265.

Amici, along with our colleagues in the House and Senate, the Sentencing Commission, judges, lawyers, and criminal justice experts, have closely monitored the operation of the federal sentencing system over the past two years.

Thus far, based on the limited data available, we do not believe that wholesale revision of the system is warranted. There has not been a rash of unwarranted sentencing disparities. Judges have not refused to consider the guidelines. Confidence in the integrity and fairness of the courts has not diminished.

In fact, according to a recent report by the Sentencing Commission, since *Booker* the overwhelming majority (85.9%) of sentences imposed by federal judges have been in conformity with the sentencing guidelines. United States Sentencing Comm'n, *Final Report on the Impact of* United States v. Booker *On Federal Sentencing* 46 (Mar. 2006). In two-thirds of the cases involving a sentence below the guideline range, the sentence imposed has been within 40% of the bottom of the range. *Id.* at 47. And while the rate of below-range sentences has increased after *Booker*, so has the average length of sentences imposed. *Id.* at 69. These data do not reflect a sentencing system in crisis. To the contrary, "the most notable fact about the federal system is how little things have changed." *Oversight Hearing on* United States v. Booker*: One Year Later – Chaos or Status Quo?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 5 (2006) (statement of Hon. Paul G. Cassell, Judicial Conference of the United States); *see also id.* at 9 ("[E]ven taking the critics' own narrow view of the appropriate measure of change, *more than 90% of all cases are being resolved in the same way as they were before* Booker.") (emphasis in original).

Amici acknowledge that after *Booker*, mandatory guidelines are "no longer an open choice." 543 U.S. at 263. Nevertheless, we believe that the existing system provides an adequate structure for the advancement of the basic goals of the Sentencing Reform Act, including transparency, the elimination of unwarranted disparity, and fair and propor-

tional sentences. The long-term viability of this system will depend on the continued willingness of judges, the Commission, and Congress to advance these goals.

There are several steps the Court can take to do so now.

1. Consulting the Guidelines

First, the Court should reiterate the duty of district judges to consult the sentencing guidelines, calculating and considering the same guideline ranges they would have applied before *Booker*. *See* 543 U.S. at 264. This requirement is set forth under § 3553, subsection (4) of which requires judges to consider "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines." The sentencing guidelines thus remain central to the operation of the federal sentencing system, and they are entitled to weight and deference. Judges should consult the guidelines in good faith, *see United States v. Tucker*, 386 F.3d 273, 278 (D.C. Cir. 2004), with an appreciation for the factors considered by the Commission in their promulgation and respect for the goals Congress intended them to promote.

Amici believe that it is appropriate for judges to calculate the applicable guideline range at or near the start of the sentencing process, as the guidelines "are the only sentencing factor that yield a measure of time." *United States v. Jimenez-Beltre*, 440 F.3d 514, 525 (1st Cir. 2006) (Lipez, J., dissenting), *cert. denied*, 2007 WL 36306 (U.S. Jan. 8, 2007) (No. 06-5727). The guidelines will then serve as an appropriate benchmark for consideration of the other factors in § 3553(a). *See* Brief of Law Professors Who Study Sentencing Reform as Amici Curiae in Support of None of the Parties at 12, *Claiborne v. United States*, No. 06-5618 (Dec. 18, 2006) ("Generally requiring basic Guideline calculations at the start of the sentencing process fosters a beneficial measure of procedural and substantive consistency: Guide-

line provisions can help frame, inform, and regularize the exercise of reasoned judgment by different sentencing judges across the nation.").

2. Deference to Commission Expertise

While the guidelines provide a useful start, amici acknowledge that district judges can no longer stop there. Section 3553(a) also directs courts to consider the needs to avoid unwarranted sentencing disparities, to provide restitution to victims, and for sentences to "reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Booker*, 543 U.S. at 260 (citing 18 U.S.C. § 3553(a)(2)). Judges must integrate the factors taken into account by the guidelines with these broader concerns about the purposes and effects of punishment.

Clearly, *Booker* has made sentencing more complex. Congress never intended the guidelines to be applied in a mechanistic manner, but some judges nonetheless criticized the system as an unduly rigid and administrative "fill in the blanks" exercise. That charge no longer carries any weight. Now, judges must now "exercise reasoned sentencing judgment by filtering the Guidelines' advice through the dynamic, multi-faceted, purpose-oriented provisions of § 3553(a)." Brief of Law Professors, *supra*, at 6.

Congress created the Commission to encourage reality-based sentencing policies: *i.e.*, policies based on objective data – not, for example, political debates "centering around the harsher versus more lenient punishment." Edward M. Kennedy, *Criminal Sentencing: A Game of Chance*, 60 Judicature 208, 213 (1976). The Commission promulgated the original guidelines based on a comprehensive review of objective sentencing data, and it continues to revise the guidelines "in consideration of comments and data coming to

its attention." *See* 28 U.S.C. § 994(o); *Booker*, 543 U.S. at 263. Indeed, Congress intended that the work of the Commission, as well as the responses of judges, lawyers, and Congress, would enable the sentencing system to evolve over time, so that its rules and policies would reflect, "to the extent practicable, advancement in human knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C). *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988).

Deference is not equivalent to duty, of course, and after *Booker* judges are no longer foreclosed from weighing circumstances previously taken into consideration by the Commission. *See* 18 U.S.C. § 3553(b). Amici also acknowledge that the performance of the Commission has not always matched reformers' expectations. *See* Brief of Amicus Curiae Marc Miller *et al.* in Support of Petitioner at 16-25, *Rita v. United States*, No. 06-5754 (Dec. 18, 2006) (criticizing the Commission for failing to cite empirical evidence or provide reasoned expectations for certain guideline amendments). Indeed, the Commission's own statements on the fundamental unfairness of the 100:1 ratio in the weight of powder and crack cocaine – a ratio currently incorporated in the sentencing guidelines – demonstrate that the guidelines do not always reflect objective data or good policy. *See* Section III.C, *infra*.

Nevertheless, amici believe that the Commission's guidelines and policy statements should continue to have a central role in sentencing. These factors are expressly enumerated in § 3553(a), and even after *Booker*, the Commission occupies an indispensable position in the sentencing structure devised by Congress. Congress established the Commission to remove politics, prejudice, and subjectivity from sentencing, and to provide a resource that would strengthen the ability of courts to impose fair and consistent sentences. To

the extent a court decides in a particular case that other § 3553(a) factors warrant the rejection of the guidelines or a policy statement issued by the Commission, it should state a principled reason for its decision.

3. Statement of Reasons

The general requirement that judges state the reasons for the sentences they impose, *see* 18 U.S.C. § 3553(c), applies regardless of whether a sentence falls within the applicable guideline range. The Seventh Circuit, for example, recently remanded a case for resentencing where the district judge, in imposing a sentence within the guidelines, did not adequately explain the basis for disregarding other § 3553(a) factors. *See United States v. Cunningham,* 429 F.3d 673, 679-80 (7th Cir. 2005).

The statement-of-reasons requirement advances several congressional goals. It promotes transparency and confidence in the sentencing system by making the justifications for each sentence part of the public record.[4] It facilitates the work of the Commission to refine the guidelines based on its monitoring of stated reasons for the imposition of sentences outside the applicable ranges. The requirement advances the goal of consistency by exposing unreasonable sentences to the light of day, and it generates a useful record for appellate review. *See* S. Rep. No. 98-225, at 80; Kennedy, *Toward a New System*, *supra*, at 370; *see also* Steven L. Chanenson, *Write On!*, 115 Yale L.J. Pocket Part 146, 147 (2006) (urging judges to write sentencing opinions "to communicate vital sentencing knowledge not only to the appellate courts but to Congress, the Commission, and the public as well").

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[4] Transparency can be achieved without undermining the independence of the judiciary. Amici strongly oppose any effort to compile reports on the sentencing practices of individual judges that fail to reflect all the factors informing their decisions in specific cases.

With these goals in mind, amici urge the Court to emphasize the need for principled sentencing justifications that other courts can consult and apply in like circumstances and which courts of appeal can readily review for reasonableness. Notwithstanding Holmes' observation that the common law "decides the case first and determines the principle afterwards," Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 Am. L. Rev. 1 (1870), elements of the statutory scheme indicate that courts should take a broader view when imposing sentences in the post-*Booker* era. First, § 3553(c) specifically directs judges to state "the reasons for its imposition of the particular sentence" (and "the specific reason" in writing for a sentence outside the applicable guideline range) – a statutory requirement that does not exist in most other areas of federal law. Second, the open-ended factors of § 3553(a) require elucidation by the courts at both the district and appellate level. Third, § 3553(a)(6) directs district courts to consider *in the course of imposing sentence* the need to avoid "unwarranted sentence disparities" – thus enlisting the courts directly in Congress's campaign to promote uniformity. It follows that district courts should articulate reasons for a sentence that not only are appropriate to the particular facts before them, but that also cite or establish principles of general applicability that can be followed or distinguished by other district courts in other cases.[5] The reasonableness of these principles may then be evaluated on appeal.

[5] In this respect, amici respectfully disagree with the proposition that sentencing decisions "must be done case by case and must be grounded in case-specific considerations," without reliance on broader principles that can be applied by courts in other cases. *See, e.g., United States v. Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006). Uniformity is advanced by the development of rules of general applicability, not the exercise of unguided discretion on a case-by-case basis.

4. Appellate Review

Appellate review may be the most powerful mechanism for ensuring the fairness and consistency of sentences imposed under the new advisory system. As discussed above, criminal justice experts believed that its absence was a primary cause of the sentencing disparity that existed before the Sentencing Reform Act. "The contention that sentencing is not regulated by rules of 'law' subject to appellate review is an argument for, not against, a system of appeals," Judge Frankel wrote. "The 'common law' is, after all, a body of rules evolved through the process of reasoned decision of concrete cases, mainly by appellate courts." Frankel, *supra*, at 84.

In developing the Act's provisions on appellate review, codified at 18 U.S.C. § 3742, Congress sought "to afford enough guidance and control" over the traditional sentencing discretion of district judges "to promote fairness and rationality, and to reduce unwarranted disparity." S. Rep. No. 98-225, at 150 (1983). Congress limited appellate review to sentences that were imposed either outside the applicable guideline range or as the result of an incorrect application of the guidelines. By eliminating the mandatory nature of the guidelines, the Court in *Booker* effectively expanded appellate review to all sentences, stating that the factors in § 3553(a) will guide courts "in determining whether a sentence is unreasonable." 543 U.S. at 261.

The complexity inherent in § 3553(a) will necessarily affect appellate review as well. While showing appropriate deference to the fact-based sentencing decisions of district judges, *see Koon v. United States*, 518 U.S. 81, 98 (1996), amici anticipate that over time appellate courts will develop rules that address, among other issues, how the § 3553(a) factors should be applied; what weight the parsimony clause in § 3553(a) should receive in the sentencing process; the relationship between individual sentences and the purposes

of punishment set forth in § 3553(a)(2); and the elimination of "unwarranted sentence disparities" among similarly situated defendants, particularly disparities reflecting consideration of illegitimate factors such as race and gender. These developments will be consistent with the goals of the Sentencing Reform Act, whose sponsors believed that "in the long run" appellate review would "facilitate the development of a truly national law of sentencing." *See* Kennedy, *Toward a New System*, *supra*, at 374.

In this case and its companion, the Court will decide the extent to which such appellate devices as the "extraordinary circumstances" test applied by the Eighth Circuit Court of Appeals below may be used to discourage the imposition of below-guideline sentences without replicating the same Sixth Amendment violation addressed in *Booker*. However the Court decides this constitutional issue, amici urge it to affirm the right and obligation of courts at all levels to articulate principled rules that are consistent with the text of § 3553(a) and designed to realize a fairer and more effective sentencing system.

C. The District Court Failed to State Clear and Principled Reasons for the Sentence It Imposed.

Amici believe that the decision of the Eighth Circuit Court of Appeals to remand this case for resentencing should be affirmed because, notwithstanding the district court's consultation of the guidelines and other relevant factors, it failed to state with sufficient clarity principled reasons for the sentence it imposed, as required by § 3553(a) and (c).

Because Mr. Claiborne pleaded guilty to possessing more than five grams of crack cocaine, he was subject to a minimum five-year sentence under 21 U.S.C. § 844(a). At sentencing, however, the court concluded that he qualified for the "safety valve" exception, which allows a sentence less than the otherwise mandatory minimum if the defendant is a first-time, low-level nonviolent offender who had

provided truthful information about his offense to the government. *See* 18 U.S.C. § 3553(f); *U.S. Sentencing Guidelines Manual* § 5C1.2 (2006). Congress enacted the "safety valve" provision in 1994 to provide relief for the harsh and disproportionate sentences imposed on nonviolent drug offenders by mandatory minimums, and thereby build on "other reforms enacted over the last decade that have dramatically increased the consistency, rationality, and, therefore, effectiveness of federal sentencing laws." H.R. Rep. No. 103-460 (1994).

After the district court determined that no mandatory minimum applied, § 3553(a) became the controlling statutory directive. *See United States v. Cardenas-Juarez*, 469 F.3d 1331, 1334 (9th Cir. 2006) (holding that when safety-valve requirements are met, courts must consult sentencing guidelines "even though they now have the discretion to impose non-Guidelines sentences") (citation omitted). The court properly calculated and considered the applicable guideline range of 37 to 46 months imprisonment, Sent. Tr. at 14, but decided to impose a substantially lower sentence of 15 months. As the judge explained, "[W]hen I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away." Sent. Tr. at 25.

While amici respect the thoughtfulness with which the court conducted the sentencing of Mr. Claiborne, we do not believe that its methodology fully conformed to the structure and goals of the Sentencing Reform Act. Some of the factors cited by the court – including the quantity of drugs and the defendant's criminal history – were already considered by the Commission in promulgating the guidelines, and the court did not discuss whether the applicable guideline range inadequately accounted for their significance. It is

also unclear whether the court's remark that a guideline sentence would result in "throwing [the defendant] away" related to the parsimony clause or the purposes of punishment set forth in § 3553(a)(2), and if so, how. The court referred to Mr. Claiborne's age, employment, family support, and low likelihood of recidivism, but did not discuss how such factors should be generally evaluated and applied under § 3553(a). One cited factor – the applicability of the safety valve – seems misplaced as a consideration, since it was essential for the § 3553(a) analysis to occur in the first place.

The court also noted that it did not consider a sentence of 37 months to be "commensurate" with other defendants it had seen "who had committed similar crimes but perhaps involving a larger . . . amount of drugs." Sent. Tr. at 25. This was an appropriate factor to consider, since § 3553(a)(6) directs courts to consider the avoidance of "unwarranted sentence disparities" in the course of imposing sentence. The court failed, however, to articulate a principled basis for its sentence that can be readily applied by other courts in like circumstances. The court may indeed have been correct that a sentence of 15 months, not 37 or 46 months, was warranted in light of the specific facts of the offense and the defendant's background. There is no guarantee, however, that another court applying the same factors considered by the court below would reach the same or a similar result. To avoid the kind of unwarranted disparities that Congress intended the Sentencing Reform Act to eliminate, clearer explanations for a sentence must be stated.

Amici do not foreclose the possibility that courts might cite the disproportionate emphasis assigned by the guidelines to the relevant quantity of crack cocaine as a principled reason for imposing a sentence below the applicable range. Even though defense counsel cited the crack-powder cocaine disparity at the hearing, Sent. Tr. at 16-17, the district court

did not cite it as a factor in imposing sentence. Attention to this problem, however, is long overdue.

The sentencing guidelines reflect a 100:1 ratio in the weight of powder and crack cocaine necessary to trigger an equivalent penalty. This disparity results from an early attempt by the Commission to incorporate congressionally mandated minimum penalties into the guidelines, even though the rigidity and harshness of mandatory minimums are completely inconsistent with the structure and goals of the Sentencing Reform Act. The Commission has since recognized that the 100:1 ratio exaggerates the relative harmfulness of crack cocaine and creates unwarranted disparities that are correlated with race. It has repeatedly urged Congress to eliminate the 100:1 ratio. *See* United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 132 (2004); United States Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 91 (2002); United States Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (1997).[6]

Congress has thus far failed to act on the Commission's recommendations.[7] That failure, however, should not be

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[6] The Sentencing Commission continues to hold hearings on the crack-powder issue. Judge Walton, appearing on behalf of the Criminal Law Committee of the Judicial Conference of the United States, recently testified that "it is unconscionable to maintain the current sentencing structure." United States Sentencing Comm'n, *Public Hearing on Cocaine Sentencing Policy* (Nov. 14, 2006) (testimony of Hon. Reggie B. Walton). *See also* The Constitution Project Sentencing Initiative, *Recommendations for Federal Criminal Sentencing in a Post*-Booker *World*, 18 Fed. Sent'g Rep. 310, 312 (2006) (stating unanimous view of bipartisan blue-ribbon committee that "100:1 weight ratio upon which guideline and mandatory minimum sentences for powder and crack cocaine are based is unjustifiable as a matter of policy").

[7] There is growing bipartisan support in Congress for addressing this disparity. For example, in the last Congress, Senators Sessions, Pryor,

interpreted as a license by the courts to disregard the Commission's policy statements. *See United States v. Williams*, ___ F.3d ___, No. 05-13205, 2006 WL 3615300, at *13 (11th Cir. Dec. 13, 2006) (Barkett, J., dissenting from the denial of rehearing en banc) ("Congress did not create an exception to § 3553(a) for crack offenses, nor did the Supreme Court in *Booker*. Sentencing courts must arrive at a sentence that is 'reasonable,' whether sentencing a crack offense or any other offense."). Since *Booker*, a number of courts have cited the Commission's policy statements and the parsimony clause of § 3553(a) as grounds for imposing below-guideline sentences for defendants convicted of crack cocaine offenses. *See* Ryan S. King & Marc Mauer, *Sentencing with Discretion: Crack Cocaine Sentencing After* Booker 13-15, 17-19 (Sentencing Project, Jan. 2006). It is well-documented that the crack-powder disparity has a disproportionate impact on African-American defendants, their families, and their communities, *see* ABA Justice Kennedy Commission Report, *supra*, Res. 121A at 28-29, and as a result has undermined public confidence in the criminal justice system. Such sentencing disparity is completely contrary to the goals of the Sentencing Reform Act, and § 3553(a) enables courts to consider this impact as they develop principled rules on sentencing.

Cornyn, and Salazar introduced a bill to reduce the ratio to 20:1. Drug Sentencing Reform Act of 2006, S. 3725, 109th Cong. (2d Sess. 2006). Other members of the House and Senate have expressed their support for a 2:1 ratio or elimination of the disparity altogether. Congress has yet to reach agreement on the role that drug weight should have or whether the applicable mandatory sentences should be repealed altogether.

CONCLUSION

Consistent with the structure and goals of the Sentencing Reform Act, the Court should encourage the development of rules that promote fair, proportional, and uniform sentences. The decision of the Eighth Circuit Court of Appeals to remand for resentencing should be affirmed.

Respectfully submitted,

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